Supreme Court, U.S.
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No. ___

IN THE

Supreme Court of the United States

ROBERT PERRY,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

I. Whether plain error review permits an appellate court to sustain a conviction under a statute declared facially unconstitutional by the Supreme Court, or is the conviction void as a matter of law?

II. When a jury returns a general verdict that may rests on a constitutionally prohibited ground, may a reviewing court examine the record evidence and determine guilt under an alternative, non-defective legal theory, and, if so, what standard is employed to review such claims?

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OPINIONS BELOW

The opinion of the United States Court of Appeals for the Eleventh Circuit appears at Appendix A to the petition and is unpublished. The order of the Eleventh Circuit denying rehearing en bane appears at Appendix B to the petition.

STATEMENT OF JURISDICTION

The United States Court of Appeals for the Eleventh Circuit entered its judgment on January 15, 2003. A timely petition for rehearing en banc was filed on February __, 2003, and denied on March 13, 2003.

The jurisdiction of the Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The First Amendment to the United States Constitution provides that:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press, or the right of the people peacably to assemble, and to petition the Government for a redress of grievances.

The Fifth Amendment to the United States Constitution states that:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Title 18, United States Code, Section 2256(8), provides that:

> "child pornography" means any visual depiction, including any photograph, film, video, picture, or computer or computer-generated image or picture, whether made or produced by electronic, mechanical, or other means, of sexually explicit conduct, where—
>
> (A) the production of such visual depiction involves the use of a minor engaging in sexually explicit conduct;
>
> (B) such visual depiction is, or appears to be, of a minor engaging in sexually explicit conduct;

(C) such visual depiction has been created, adapted, or modified to appear that an identifiable minor is engaging in sexually explicit conduct; or

(D) such visual depiction is advertised, promoted, presented, described, or distributed in such a manner that conveys the impression that the material is or contains a visual depiction of a minor engaging in sexually explicit conduct

STATEMENT OF THE CASE

Robert Perry was indicted on one count of possessing child pornography in violation of 18 U.S.C. § 2252A(a)(5)(B), and two counts of receiving and distributing what "appears to be" child pornography in violation of 18 U.S.C. § 2252A(a)(2). *See* Appendix C.

After an initial hung jury resulted in a mistrial, Perry proceeded to trial a second time. During the course of the second trial, the Government elicited the words "appear to be" or "appeared to be" child pornography no less than twenty-one times from various witnesses describing images and exhibits to the jury. On sixteen separate occasions witnesses described various images to the jury simply as child pornography "as defined by the statute."

During closing argument, Perry's trial counsel stated "we're dealing with children here," and "[a]nytime you're dealing with a child being harmed, you're in a no-win situation."

In its instructions to the jury defining child pornography, the district court repeated the "appears to be" definition of child pornography, among others, set forth in § 2256(8)(B). *See* Appendix E.

The jury returned a general verdict of guilty on all three counts, without specifying which definition of child pornography it relied on in finding Perry guilty. *See* Appendix E.

Perry did not challenge the constitutionality of § 2256 (8)(B), or otherwise object to the jury instructions during the course of the trial.

The court of appeals affirmed Perry's convictions on all three counts, finding that "any error did not seriously affect the fairness, integrity, or public reputation of the judicial proceedings, as the evidence clearly established that the images were actual children." Appendix A, at 5-6.

The basis for federal jurisdiction in the district court was founded on 18 U.S.C. § 3231. The court of appeals had jurisdiction over Perry's appeal from the final judgment of the district court under 28 U.S.C. § 1291.

REASONS FOR GRANTING THE WRIT

I. PLAIN ERROR REVIEW DOES NOT PERMIT AN APPELLATE COURT TO SUSTAIN A CONVICTION UNDER A STATUTE DECLARED FACIALLY UNCONSTITUTIONAL BY THE SUPREME COURT BECAUSE THE CONVICTION IS VOID AS A MATTER OF LAW.

Perry seeks review by certiorari of the court of appeals' decision sustaining his conviction on two counts of receiving and distributing what "appears to be" child pornography in violation of 18 U.S.C. § 2252A(a)(2). The court of appeals upheld Perry's convictions after determining this Court's decision in *Ashcroft v. Free Speech Coalition*, 535 U.S. 234, 122 S.Ct. 1389, 152 L.Ed.2d 403 (2002), was inapplicable. Because Perry's indictment on the two counts specifically charged the "appears to be" theory condemned in *Free Speech Coalition*, and because the Government presented substantial evidence that the images appeared to be child pornography as well as relying on jury instructions containing the unconstitutional "appears to be" definition, Perry's con-

victions cannot stand under a statutory definition this Court has held facially unconstitutional. The court of appeals' decision conflicts with *Free Speech Coalition*, and significantly departs from this Court's prior precedent on the effect of a statue declared facially unconstitutional. The court of appeals' decision also conflicts with the recent decision of the Tenth Circuit in *United States v. Pearl*, 324 F.3d 1210 (10th Cir.2003), as well as the Fourth Circuit in *United States v. Ellyson*, 324 F.3d 522, (4th Cir.2003) both of which refused to apply plain and harmless error review, respectively, to convictions obtained under the invalidated statute.

A. 18 U.S.C. § 2256(8)(B) Is Void

In *Free Speech Coalition*, this Court unambiguously declared § 2256(8)(B) facially unconstitutional. 122 S.Ct. at 1406 ("For the reasons we have set forth, the prohibitions of §§ 2256(8)(B) and 2256(8)(D) are overbroad and unconstitutional."). As the dissent in *Free Speech Coalition* recognized, "invalidation due to overbreadth is such 'strong medicine'" *id.* at 1407 (O'Connor, J., concurring in the judgment in part and dissenting in part) (quoting *Broadrick v. Oklahoma*, 413 U.S. 601, 613, 93 S.Ct. 2908, 37 L.Ed.2d 830 (1973)), because it voids the law altogether. *Ex parte Royall*, 117 U.S. 241, 248, 6 S.Ct. 734, 29 L.Ed. 868 (1886) ("'An unconstitutional law is void, and is as no law. An offense created by it is no crime. A conviction under it is not merely erroneous, but is illegal and void, and cannot be a legal cause of imprisonment.'" (quoting *Ex parte Siebold*, 100 U.S. 371, 376, 25 L.Ed. 717 (1880)); *Ex parte Yarbrough*, 110 U.S. 651, 654, 4 S.Ct. 152, 28 L.Ed. 274 (1884) ("If the law which defines the offense and prescribes its punishment is void, the court was without jurisdiction and the prisoners must be discharged."); *Calder v. Bull*, 3 U.S. 386, 399, 1 L.Ed. 648 (1798) ("If any act of Congress, or of the Legislature of a state, violates these constitutional provisions, it is unquestionably void."); *see also Reynoldsville Casket Co. v. Hyde*,

514 U.S. 749, 760, 115 S.Ct. 1745, 131 L.Ed.2d 820 (1995)(Scalia, J., concurring).

In *Massachusetts v. Oakes*, 491 U.S. 576, 109 S.Ct. 2633, 105 L.Ed.2d 493 (1989), this Court held that an "overbroad statute is not void *ab initio* but rather voidable, subject to invalidation *notwithstanding the defendant's unprotected conduct* out of the solicitude to the First Amendment rights of parties not before the court." 491 U.S. at 584 (emphasis added). The Court explained this statement from *Oakes* one Term later in *Osborne v. Ohio*, 495 U.S. 103, 110 S.Ct. 1691, 109 L.Ed.2d 98 (1990), where it stated that once a statute is declared overbroad on constitutional grounds, "there [can] be no convictions under that law even of those whose own conduct is unprotected by the First Amendment." 495 U.S. at 121.[1]

In declaring facially unconstitutional two of the four definitions of child pornography under the Child Pornography Prevention Act ("CPPA"), *Free Speech Coalition* enumerated each of the definitions under the statutory scheme. It noted that before the CPPA, Congress defined child pornography as "images made using actual minors. The CPPA retains that prohibition at 18 U.S.C. § 2256(8)(A) and adds three other prohibited categories of speech . . . ." 122 S.Ct. at 1397. The Court went on to explain that § 2256(8)(B), the provision at issue here, prohibits "a range of depictions, sometimes called 'virtual child pornography,' which include computer gen-

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[1] Even a defendant who pleads guilty maintains the right to attack "the State's power to bring any indictment at all[,]" *United States v. Broce*, 488 U.S. 563, 575, 109 S.Ct. 757, 102 L.Ed.2d 927 (1989), or that "judged on its face—the charge is one which the State may not constitutionally prosecute." *Menna v. New York*, 423 U.S. 61, 62 n.2, 96 S.Ct. 241, 46 L.Ed.2d 195 (1975) (per curiam). *See also United States v. Morgan*, 230 F.3d 1067, 1071 (8th Cir. 2000) ("A claim that a statute is facially unconstitutional falls within the exception [that a guilty plea does not foreclose collateral attack]."), *cert. denied* 122 S.Ct. 62 (2001).

erated images, as well as images produced by more traditional means." *Id.* Any doubt about whether § 2256(8)(B) was struck down in its entirety evaporates when one reviews the approach suggested by the dissent in *Free Speech Coalition*, and implicit in the court of appeals' holding, to invalidate § 2256(8)(B) in part:

> This litigation involves a facial challenge to the CPPA's prohibitions of pornographic images that "appear to be of a minor" and of material that "conveys the impression" that it contains pornographic images of minors. While I agree with the Court's judgment that the First Amendment requires that the latter prohibition be struck down, I disagree with *its decision to strike down the former prohibition in its entirety.*

122 S.Ct. at 1407 (O'Connor, J., concurring in the judgment in part and dissenting in part) (emphasis added).

Decisions of this Court "holding that a substantive federal criminal statute does not reach certain conduct . . . necessarily carry a significant risk that a defendant stands convicted of an act that the law does not make criminal." *Bousley v. United States*, 523 U.S. 614, 620, 118 S.Ct. 1604, 140 L.Ed.2d 828 (1998) (internal citations and quotations emitted). On the face of Perry's indictment, he stands convicted of an offense this Court has held is no crime at all.

B. Plain Error Inapplicable

The above cases admit of no exceptions to the rule of voiding any conviction obtained under a facially unconstitutional statute. The court of appeals sustained Perry's convictions under the fourth prong of the plain error standard set forth in *United States v. Olano*, 507 U.S. 725, 731-32, 113 S.Ct. 1770, 123 L.Ed.2d 508 (1993). *See* Appendix A, at 5-6. In particular, the court of appeals determined that the images

in question were of actual children.[2] Assuming, *arguendo*, trial counsel's statements in closing can fairly be characterized as a concession the images depicted actual children, or that the actual children theory could somehow fit consistently within the substantive holding in *Free Speech Coalition* that § 2256(8)(B) is facially unconstitutional, Perry's convictions would contravene the Fifth Amendment for the simple reason that he *was never* charged in counts two and three with the actual children theory.

The Court has never held, much less suggested, that plain error review permits an appellate court to uphold a conviction under a facially unconstitutional statute. Nor has it ever sanctioned plain error review as a means to sustain a conviction under an *uncharged* alternative legal theory. The court of appeals' approach is an unwarranted extension of this Court's plain error jurisprudence. It is true that plain error review permits an appellate court to judge the evidence in determining whether the fourth prong of *Olano* has been satisfied. *See United States v. Cotton*, 535 U.S. 625, ___, 122 S.Ct. 1781, 1786, 152 L.Ed.2d (2002). But the Court, in either the plain or harmless error context, has not extended this doctrine beyond, for example, conforming the evidence to omissions of an offense element, *Cotton*, 122 S.Ct. at 1787,

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[2] The court of appeals' ruling emphasized its determination that Perry s counsel, in closing statements, conceded that the images involved actual children. Appendix A, at 6, 8. Even if trial counsel's statement could be considered evidence, *cf. Boyde v. California*, 494 U.S. 370, 384, 110 S.Ct. 1190, 108 L.Ed.2d 316 (1990) (statements of counsel carry less weight than instructions and must be viewed in context), the isolated statement by counsel that "we're dealing with children here, [and] anytime you're dealing with a child being harmed, you're in a no-win situation" is so ambiguous and equivocal that reliance an it to sustain Perry's convictions is misplaced and out of context. Moreover, trial counsel's statements stand in sharp contrast to the actual stipulation that minors were depicted in the images found insufficient by the Tenth Circuit in *United States v. Pearl*, 324 F.3d 1210, 1214 (10th Cir.2003).

misdescriptions of the offense elements, or improper presumptions on an offense element. *See, e.g., Neder v. United States*, 527 U.S. 1, 9-13, 119 S.Ct. 1827, 144 L.Ed.2d 35 (1999) (collecting cases applying harmless error in jury instruction context). None of those cases involved an ambiguous verdict, much less a facially unconstitutional statute. In *Pope v. Illinois*, 481 U.S. 497, 107 S.Ct. 1918, 95 L.Ed.2d 439 (1987), it was determined that harmless error analysis could be applied in reviewing a jury instruction containing an unconstitutional definition, 481 U.S. at 502, but the Court did not find the statute facially unconstitutional. *Id.* Consequently, the Court remanded for the application of the harmless error analysis, *id.* at 504, because the *Pope* defendants "could still be retried under that statute, provided that the erroneous instruction was not repeated[.]" *Id.* at 502.

In contrast, conviction for an offense which is facially unconstitutional is not readily susceptible to plain or harmless error review because the charged conduct—in this case, what "appears to be" child pornography—is no crime at all. *See Free Speech Coalition*, 122 S.Ct. at 1402 & 1404 ("the CPPA prohibits speech that records no crime and creates no victims by its production[;]" and under § 2256(8)(B) "there is no underlying crime at all."). Stated differently, a reviewing court may not, indeed cannot, look at the record evidence and determine that, had the Government charged a crime *completely different* from that alleged in the indictment, the jury would have returned a guilty verdict, because the evidence in support of the uncharged offense was overwhelming and uncontroverted. *Cf. Stirone v. United States*, 361 U.S. 212, 217, 80 S.Ct. 270, 4 L.Ed.2d 252 (1960) (right to be tried only on charges set forth in indictment "is far too serious" to be subject to harmless error review). Such an approach would itself turn *Olano's* fourth prong on its head because it would seriously affect the integrity and public reputation of judicial proceedings for an appellate court, in addition to its familiar role, to perform the function of

both the grand and petit juries. It would also contravene the Fifth Amendment.

Yet that is precisely what the court of appeals, in effect, did here. The Government charged Perry in counts two and three with receiving and distributing what "appears to be" child pornography. *See* Appendix D. The jury instructions relied on the invalid "appears to be" definition, among others. *See* Appendix E. As noted earlier, the trial testimony is replete with instances of witnesses using the actual words "appears to be" child pornography in describing the images to the jury. The jury returned a general verdict of guilty on counts two and three. Rather than void Perry's convictions for an offense this Court has held to be no crime at all, the court of appeals sustained his convictions for offenses (actual children) he was never charged with. Plain error review does not permit an appellate court to let in the back door a prosecution theory not alleged in the indictment.

The Court faced a remarkably similar situation in *Bachellar v. Maryland*, 397 U.S. 564, 90 S.Ct. 1312, 25 L.Ed.2d 570 (1970), where it was argued that the defendant's conduct in a sidewalk obstruction prosecution violated not only the offense charged under the statute the Court declared facially unconstitutional, but a separate statutory provision which the State of Maryland argued was constitutional. In rejecting the State's argument to conform the conviction to the uncharged, but constitutional statutory provision, the Court stated:

> "[h]ad the State wished to ensure a finding on the obstruction question, it could have prosecuted petitioners under [the separate constitutional provision]." 397 U.S. at 569 n.7.

No other court of appeals has upheld a conviction under § 2256(8)(B) after *Free Speech Coalition* using plain error or

any other standard of review.[3] In fact, the Tenth Circuit recently reached a conclusion opposite to that of the court of appeals below in *United States v. Pearl*, 324 F.3d 1210 (10th Cir.2003), holding that "the plain error standard is inappropriate" for errors in convictions obtained under the invalid definition of child pornography set forth in § 2256(8)(B), because such errors are the type that can be raised at any time. 324 F.3d at 1213. [The court of appeals' decision, therefore . . .] The court of appeals' decision, therefore, is a significant departure from this Court's precedent that any conviction under an overbroad statute "cannot be a legal cause for imprisonment." *Siebold*, 100 U.S. at 376. Consequently, certiorari should be granted, and Perry's convictions on counts two and three should be reversed.

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[3] *United States v. Kelly*, 314 F.3d 908 (7th Cir.2002), *Petitoin for cert. filed*, No. 02-1420, is not to the contrary because the defendant in that case was charged with both virtual child pornography and images containing actual children. More importantly, the Seventh Circuit noted that the government moved to dismiss the counts charging virtual child pornography after the Court's decision in *Free Speech Coalition*, leaving intact only the counts charging images of actual children. 314 F.3d at 910. Significantly, question two in Kelly's pending cetiorari petition indicated he pled guilty to a count charging "child pornography" without differentiarting between the valid and invalid definitions contained in § 2256(8).

The court of appeals' reliance on its prior decisoin in *United States v. Richardson*, 304 F.3d 1061 (11th Cir. 2002), *cert. denied*, 123 S.Ct. 930 (2003), is likewise distinguishable,because the indictment in that case did not allege the "appears to be" theory to the exclusion of the other statutory definitions of child pornography. Rather, the indictment in that case alleged "child pornography," and the jury instructions *alone* included the invalid "appears to be" theory as well as the valid definitions of child pornography. 304 F.3d at 1063. Because Perry's indictment, in counts two and three, charged the invalid "appears to be" theory alone, *Richardson* does not resolve the issue raised herein.

II. A GENERAL VERDICT WHICH MAY REST ON A CONSTITUTIONALLY PROHIBITED GROUND MAY NOT BE UPHELD BY FOCUSING ON THE RECORD EVIDENCE WHICH SUPPORTS AN ALTERNATIVE, NON-DEFECTIVE LEGAL THEORY.

Even if Perry's convictions on counts two and three survive the facial unconstitutionality of § 2256(8)(B), "it has been settled law since *Stromberg v. California*, 283 U.S. 359, 51 S.Ct. 532, 75 L.Ed. 1117 (1931), that when there exists a reasonable possibility that the jury relied on an unconstitutional understanding of the law, that verdict must be set aside." *Francis v. Franklin*, 471 U.S 307, 322 n.8, 105 S.Ct. 1965, 85 L.Ed 2d 344 (1985). *See also Griffin v. United States*, 502 U.S. 46, 55, 112 S.Ct. 466, 116 L.Ed.2d 371 (1991) ("A host of our decisions [has applied the *Stromberg* rule] to general-verdict convictions that may have rested on an unconstitutional ground.") (citing cases).

In *Boyde v. California, supra*, the Court did not retreat from the *Stromberg* line of cases, stating that when an instruction is "submitted to the jury on alternative theories the unconstitutionality of any of the theories requires that the conviction be set aside." 494 U.S. at 379-80. *Boyde* involved neither a facially unconstitutional statute nor even an erroneous instruction, but an "ambiguous" instruction that may have been interpreted erroneously. *Id.* at 380. After noting prior cases made it less than clear what standard a court should employ in reviewing faulty jury instructions, *id.* at 378-80, the Court drew a clear distinction between *Stromberg*-type errors [4] and cases involving ambiguous jury

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[4] *Stromberg*-type error is characterized as nothing more than the principle that, "where a provision of the Constitution forbids conviction on a particular ground, the constitutional guarantee is violated by a general verdict that may have rested on that ground." *Griffin*, 502 U.S. at 53.

instructions subject to erroneous interpretation. In the former cases, it was stated:

> a jury is clearly instructed by the court that it may convict a defendant on an impermissible legal theory as well as on a proper theory or theories. Although it is possible the guilty verdict may have had a proper basis, it is equally likely that the verdict rested on an unconstitutional ground, and *we have declined to choose between two such likely possibilities.*

494 U.S. at 380 (emphasis added) (internal citation and quotations omitted). In the latter cases, as was the situation in *Boyde* the Court adopted a "reasonable likelihood" standard of whether the challenged instruction was impermissibly relied on by the jury. *Id.*

Two terms after *Boyde*, the Court clarified its general-verdict jurisprudence in *Griffin, supra*, where it rejected an expansion of Stromberg-type *legal* errors to cases challenging the *factual* sufficiency of one of the objects in a multi-object conspiracy. Echoing the distinction it made in *Boyde*, the Court drew what it called a "clear line" that made good sense, stating:

> Jurors are not generally equipped to determine whether a particular theory of conviction submitted to them is contrary to law—whether, for example, the action in question is protected by the Constitution, is time barred, or fails to come within the statutory definition of the crime. When, therefore, jurors have been left the option of relying upon a legally inadequate theory, there is no reason to think that their own intelligence and expertise will save them from that error. Quite the opposite is true, however, when they have been left the option of relying upon a factually inadequate theory, since jurors *are* well

> equipped to analyze the evidence, *see Duncan v. Louisiana*, 391 U.S. 145, 157, 88 S.Ct. 1444, 1451, 20 L.Ed.2d 491 (1968).

502 U.S. at 59, 112 S.Ct. at 474. Thus *Griffin* teaches that an error in a legal theory submitted to the jury is not saved by hypothesizing a verdict the jury would have returned absent the legal error.

In this case, Perry's jury was left the option of relying on not merely a legally invalid theory, but a *constitutionally* prohibited one. In this vein, Perry s convictions on each of the charged counts, including count one, are infirm even though the jury instructions left open the possibility the verdict rested on a proper legal theory.[5]

The court of appeals did not discuss what standard it employed in determining what ground the jury's verdict rested on. It focused solely on the evidence which supported the constitutional ground. The court of appeals did not evaluate whether the jury's verdict could have been based solely upon the constitutionally prohibited "appears to be" definition set forth in § 2256(8)(B). This, Perry argues, was error because this Court's precedent suggests that the focus is not on whether there is sufficient evidence which supports the valid legal theory, but whether there is any evidence which the jury could have relied on to support the invalid theory. *Cf. Street v. New York*, 394 U.S. 576, 585-86, 89 S Ct. 1354, 22 L.Ed.2d 572 (1969) (*Stromberg* rule requires conviction to be set aside "if we find that it *could have* been based solely upon [constitutionally prohibited ground]." (Emphasis added). *See also Terminiello v. City of Chicago*, 337 U.S. 1, 5, 69 S Ct. 894, 93 L Ed.2d 1131 (1949) (conviction reversed because "it could not be determined that the defendant was not convicted under [the unconstitutional part].")

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[5] Count one of the indictment differs from counts two and three insofar as it did not charge the "appears to be" child pornography definition invalidated in *Free Speech Coalition*. See n.3, *supra*.

As was noted by the Court in *Boyde*, it is important to identify the proper standard a reviewing court employs in sorting out whether a general verdict rests on a valid legal basis This is so because standardless determinations would invite differing results, which in turn subjects the judiciary to criticism. An appellate court is in an unfamiliar role when it evaluates the evidence to determine on what basis a jury rested its verdict. This Court has never squarely addressed what standard, if any, is to be used when it is possible that the jury's verdict rested on a constitutionally prohibited theory. While *Boyde* adopted a standard of a "reasonable likelihood" that an instruction was impermissibly relied on by the jury, 494 U.S. at 380,[6] it is not at all certain the Court would apply that same standard in cases where a jury's verdict may have rested on a constitutionally prohibited theory. Indeed, *Boyde* expressly noted that the Court has "declined to choose between" the two likely possibilities in the context of *Stromberg*-type errors. 494 U.S. at 380.

Because the court of appeals did not identify what standard it employed, and because the Court has not decided this issue, this case is an appropriate one to adjudicate the important federal question of what standard, if any, a reviewing court should utilize in reviewing a general verdict which may have rested on a constitutionally prohibited theory.

The Eleventh Circuit's decision cannot be squared with two decisions of its sister circuits on the effect of a general verdict which may have rested on an unconstitutional ground. In *Pearl*, the Tenth Circuit rejected the government's

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[6] As noted earlier, the court of appeals relied on its prior decision in *Richardson*, 304 F.3d at 1061, to sustain Perry's conviction. *Richardson* appears to have employed the reasonable likelihood test of *Boyde*. 304 F.3d at 1064 n.2. Since *Boyde* clearly distinguished between *Stromberg*-type errors and erroneous instructions, and applied the "reasonable likelihood" test only in the latter cases, the court of appeals appears to have utilized the wrong standard.

invitation to review the images in question "as a substitute for the government's burden of proving at trial the depiction of actual minors". 324 F.3d at 1214. The Tenth Circuit declined to follow the Eleventh Circuit's decision in *Richardson, supra*, while also noting that that decision emphasized the expert testimony offered by the government at trial which established that the images depicted actual minors. 324 F.3d at 1214.[7] Relying on *Stromberg* and *Griffin*, the Tenth Circuit reversed Pearl's convictions. 324 F.3d at 1213-14. Similarly, in *United States v. Ellyson*, 324 F.3d 522, 531 (4th Cir.2003), the Fourth Circuit set aside a verdict because the government failed "to establish the use of an actual child victim . . . [and] the evidence in the record, coupled with the court's instructions, permitted the jury to convict [the defendant] on both a constitutional and unconstitutional basis". *Id.* at *7. Accordingly, the decision below conflicts with the decisions of other circuits on the same matter.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted,

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Attorney for Petitioner
Robert Perry

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[7] Unlike *Richardson*, but similar to *Pearl*, the Government offered no expert testimony at Perry's trial on the question of whether the images deicted actual minors.

APPENDIX A

[DO NOT PUBLISH]

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

[Filed January 15, 2003]

No. 02-11369
Non-Argument Calendar

D.C. Docket No. 00-00 166-CR-T-30

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

versus

ROBERT PERRY,
Defendants-Appellant.

Appeal from the United States District Court for the
Middle District of Florida

Before DUBBING, BARKETT and HULL, *Circuit Judges.*

PER CURIUM:

Appellant Robert Perry appeals his convictions for: (1) possession of child pornography, in violation of 18 U.S.C. § 2252A(5)(B); and (2) knowingly receiving and distributing child pornography, in violation of 18 U.S.C. § 2252A(a)(2), all in violation of the Child Pornography Prevention Act ("CPPA").

On appeal, Perry contends that: (1) the evidence seized from his computer should have been suppressed; (2) *Ashcroft v. Free Speech Coalition*, 535 U.S. 234, 122 S. Ct. 1389, 152 L. Ed. 2d 403 (2002), declaring the "appears to be" language

of the CPPA and an affirmative defense provision of the CPPA unconstitutional, requires a reversal of his convictions; (3) the district court's instructions to the jury constructively amended the indictment to broaden the possible bases of conviction; and (4) the district court's instructions regarding the definition of "knowingly" were confusing and erroneous.

In reviewing a district court's ruling on a motion to suppress evidence, we review factual findings for clear error and the court's application of law to those facts *de novo*. *United States v. Gordon*, 231 F.3d 750, 753-54 (11th Cir. 2000), *cert. denied*, 531 U.S. 1200 (2001). The facts are construed in the light most favorable to the prevailing party. *Id.* at 754.

A warrantless seizure of property, in the absence of consent, is presumptively unreasonable.[1] *United States v. Santa*, 236 F.3d 662, 668 (11th Cir. 2000). Perry argues that no exigent circumstances existed, which justified an exception to the warrant requirement. A warrantless seizure is permissible where both probable cause and exigent circumstances exist. *United States v. Tobin*, 923 F.2d 1506, 1510 (11th Cir. 1991) (*en banc*). While the agent had probable cause, no exigent circumstances existed justifying the warrantless seizure of Perry's computer because Perry was unaware of the police surveillance and the risk that children may view pornography is not an exigent circumstance that we have recognized. *See id.* at 1511 (explaining that circumstances are not normally considered exigent where the suspects are unaware of police surveillance or where the police officers create the exigent circumstances); *see also Santa*, 236 F.3d at 669. Perry further contends that his mother lacked any apparent or common

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[1] Perry does not assert any arguments on appeal that he did not sign the form consenting to the search of the computer freely and voluntarily. *See United States v. Ford*, 270 F.3d 1346, 1347 (11th Cir. 2001) (explaining that arguments and issues not raised in an initial brief are deemed abandoned), *cert. denied*, 122 S. Ct. 2297 (2002).

authority to consent to the seizure of the computer. However, any errors in the district court's findings of exigent circumstances or as to the mother's apparent authority are harmless.

Notwithstanding the evidence derived from the search of Perry's computer, the evidence obtained from AOL's initiating complaints was overwhelming, such that Perry did not suffer prejudice from the other admitted evidence. *See United States v. Rhind*, 289 F.3d 690, 694 (11th Cir. 2002) (concluding that any error in admitting evidence derived from a warrantless search of a bag was harmless "because the other evidence of guilt was so overwhelming that the defendants suffered no prejudice from the admitted evidence"). Consequently, we conclude any error made by the district court in denying Peny's motion to suppress the evidence derived from Perry's computer was harmless.

Perry next argues that *Free Speech Coalition* held that the statute under which he was convicted is unconstitutional and, thus, his convictions should be reversed. However, in *Free Speech Coalition*, the Supreme Court held unconstitutional as overbroad only the "appears to be" language of the definitions of child pornography. 122 S. Ct. at 1405. Perry contends that the government indicted him under the "appears to be" language of § 2252A and, consistent with the indictment, the government offered proof at trial on the "appears to be" element of the statute.

Where claims are raised for the first time on appeal, we will review for plain error to avoid manifest injustice. *United States v. Olano*, 507 U.S. 725, 731-32, 113 S. Ct. 1770, 1776-77, 123 L Bd. 2d .508 (1993). If an error that is plain and affects substantial rights exists, we may exercise our discretion and correct the error if it seriously affects the fairness and integrity or public reputation of the judicial proceedings. *Olano*, 507 U.S. at 731-32, 736, 113 S. Ct. at 1779.

Even if the district court erred by instructing the jury using the "appears to be" language, no miscarriage of justice occurred. *See United States v. Richardson*, 304 F.3d 1061, 1064 (11th Cir. 2002) (holding that although a jury instruction using the "appears to be" language was a plain error, affirming the defendant's convictions " would neither work a miscarriage of justice nor seriously affect the fairness, integrity or public reputation of [the] judicial proceeding" as the evidence clearly established that the children depicted in the images or pictures were actual children); *see also United States v. Hersh*, 297 F.3d 1233, 1254 n.31 (11th Cir. 2002) (stating that, although *Free Speech Coalition was* not at issue, because compelling evidence existed that the images portrayed real children, the convictions on the child pornography counts were not invalid); *United States v. Bender*, 290 F.3d 1279, 1282 n.2 (11th Cir.) (noting that, although the provisions 18 U.S.C. §§ 2256(8)(B) and 2256(8)(D) were not at issue, because sufficient evidence existed that the images portrayed real children, *Free Speech Coalition* was not pertinent to the issue in the case), *cent. denied*, 123 S. Ct. 571 (2002).

In the present case, as in *Richardson,* even if the district court erred by instructing the jury using the "appears to be" language, no miscarriage of justice occurred. Furthermore, any error did not seriously affect the fairness, integrity, or public reputation of the judicial proceedings, as the evidence clearly established that the images depicted were actual children. *See Richardson,* 304 F.3d at 1063. Agent Sheehan definitively testified that, based on his professional experience, several of the video clips and images depicted persons "clearly under 18,"one of whom was under 8 years old; (2) Perry conceded in closing that actual children were involved; and (3) the exhibits in the record supported the foregoing. Consequently, because sufficient evidence existed that the images portrayed real children, his convictions were not a miscarriage of justice. Furthermore, because Perry

acknowledged that actual children were used in the images, his arguments that: (1) he was impermissibly precluded from presenting the affirmative defense that the children in the images were not real children; and (2) § 2252A(c) impermissibly shifted the burden to Perry to disprove elements of the offense, in that it required him to establish that the images did not depict children, are without merit.

Perry also argues that, the district court committed reversible error by instructing the jury that it could convict him on several different theories not alleged in the superseding indictment. Perry alleges that: (1) because he was ably charged with committing child pornography under the "appears to be language," the district court erred in instructing the jury on the other statutory definitions of child pornography; (2) he could be found guilty of receiving and distributing child pornography if the material used to produce the images had been "mailed, shipped, or transported" through interstate or foreign commerce, whereas the superseding indictment charged only that he had received or distributed images that had "been transported" through interstate commerce; and (3) he could be found guilty if the images had been mailed or shipped in interstate commerce, whereas the superseding indictment only alleged that the images had been transported through interstate commerce.

We apply a deferential standard of review to a district court's jury instructions. *United States v. Starke*, 62 F.3d 1374, 1380 (11th Cir. 1995). "So long as the instructions accurately reflect the law, the trial judge is given wide discretion as to the style and wording employed in the instructions." *Id.* (citation omitted). Because Perry failed to object to the jury instruction at trial, we will review the issue only for plain error. *Id.* "Jury instructions will be reversed for plain error only if, 'the charge, considered as a whole, is so clearly erroneous as to result in a likelihood of a grave miscarriage of justice, or the error seriously affects the fairness,

integrity, or public reputation of the judicial proceedings.'" *United States v. Behety,* 32 F.3d 503, 511 (11th Cir. 1994) (citations and internal quotations omitted). "A constructive amendment to the indictment occurs where the jury instructions so modify the elements of the offense charged that the defendant may have been convicted on a ground not alleged in the indictment." *United States v. Simpson*, 228 F.3d 1294, 1299 (11th Cir. 2000) (citations omitted).

As noted, Perry conceded at trial that the images depicted actual children. Consequently, Perry's substantial rights were not affected by the district court's instructing the jury on each statutory definition of child pornography. Because the charges, considered as a whole, were not so clearly erroneous as to result in a likelihood of a grave miscarriage of justice, or seriously affect the fairness, integrity, or public reputation of the judicial proceedings, no plain error occurred. *See Behety,* 32 F.3d at 511.

On appeal, Perry does not argue that the child pornography was not, in fact, transmitted in interstate commerce. On the contrary, the evidence in the record clearly established that the images, and the materials used to produce those images, traveled in interstate commerce, via the Internet, therefore, necessarily "by computer." In addition, circumstantial evidence can be used to establish the interstate commerce element. *Hersh,* 297 F.3d at 1254 n.31. Therefore, the jury instructions did not modify the elements of the offense, such that Perry was convicted on any ground not alleged in the indictment. *See Simpson*, 228 F.3d at 1299.

Finally, Perry argues that the district court erred in not instructing the jury that it had to find that he knew that the images, or that the material used to produce the images, had been transported in interstate commerce. Relying on *United States v. X-Citement Video*, 513 U.S. 64, 115 S. Ct. 464, 130 L. Ed. 2d 372 (1994), he argues that, under the CPPA, knowing the foregoing is an essential element of the offense.

He avers that the district court initially instructed the jury that, "knowingly' refers to the act of transporting, shipping, receiving and possessing the material, in this case through the use of a computer," and then later instructed that, "[t]he defendant need not know that the visual depictions or materials used to produce such depiction had been shipped or transported in interstate or foreign commerce. " Perry contends that the instructions were confusing and misled the jury to unconstitutionally convict him without a finding that he knew the images, or materials used to produce the images, were transported in interstate commerce.

Although not directly faced with the issue presented, we have construed the elements of the offense so that "knowingly" does not apply to the interstate commerce element. *Bender*, 290 F.3d at 1284 (summarily rejecting defendant's argument that the district court erred in instructing the jury that it was not required to find an intent to affect interstate commerce). Consequently, the district court properly instructed the jury that "knowingly" under § 2252(a)(2) applied only to whether (1) the individual depicted was a minor, and (2) the depiction involved sexually-explicit conduct. The instructions accurately reflected the law and, thus, the district court did not commit plain error. *See Starke,* 62 F.3d at 1380.

Accordingly and for the above stated reasons, we affirm Perry's convictions.

AFFIRMED.

APPENDIX B

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

[Filed Mar. 13, 2003]

No. 02-11369-HH

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

versus

ROBERT PERRY,
Defendant-Appellant.

On Appeal from the United States District Court
for the Middle District of Florida

ON PETITION(S) FOR REHEARING AND
PETITION(S) FOR REHEARING EN BANC

Opinion_____, 11th Cir., 19__, __F.2d____).

Before: DUBINA, BARKETT AND HULL, *Circuit Judges.*

PER CURIAM:

The Petition(s) for Rehearing are DENIED and no Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure), the Petition(s) for Rehearing En Banc are DENIED.

ENTERED FOR THE COURT:

/s/ Ineligible
UNITED STATES CIRCUIT JUDGE

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

[Filed Jan. 15, 2003]

No. 02-11369

District Court Docket No. 00-00166-CR-T-3 0

UNITED STATES OF AMERICA
Plaintiff Appellee,

versus

ROBERT PERKY,
Defendant-Appellant.

Appeal from the United States District Court for the
Middle District of Florida

JUDGMENT

It is hereby ordered, adjudged, and decreed that the attached opinion included herein by reference, is entered as the judgment of this Court.

Entered: January 15, 2003
For the Court: Thomas K. Kahn, Clerk
By: Gilman, Nancy

APPENDIX D

UNITED STATES DISTRICT COURT MIDDLE DISTRICT OF FLORIDA TAMPA DIVISION

Case No. 8:00-CR-166-T-171

UNITED STATES OF AMERICA

v.

ROBERT PERRY

SUPERSEDING INDICTMENT

The Grand Jury charges:

COUNT ONE

From at least on or about September 29, 1998, to on or about April 12, 2000, at Tampa, in the Middle District of Florida,

ROBERT PERRY,

the defendant herein, knowingly possessed computer images that contained images of child pornography that had been mailed, shipped, and transported in interstate and foreign commerce by any means, including by computer, and that was produced using materials that had been mailed, shipped, and transported in interstate and foreign commerce by and means, including by a computer.

In violation of Title 18, United States Code, Section 2252A(a)(5)(B). May 5

COUNT TWO

From at least on or about September 29, 1998 to in or about December, 1998, at Tampa, in the Middle District of

Florida, and elsewhere, defendant herein, did knowingly receive and distribute child pornography, which visual depiction is, or appears to be, of a minor engaging in sexually explicit conduct, which had been transported in interstate commerce by computer.

In violation of Title 18, United States Code, Section 2252A(a)(2). May 15

COUNT THREE

From at least on or about June 21, 1999 to in or about November, 1999, at Tampa, in the Middle District of Florida, and elsewhere,

ROBERT PERRY,

defendant herein, did knowingly receive and distribute child pornography, which visual depiction is, or appears to be, of a minor engaging in sexually explicit conduct, which had been transported in interstate commerce by computer.

In violation of title 18, United States Codes, Section 2252A(a)(2). May 15

FORFEITURES

(A) The allegations contained in Count One through Three of this Indictment are hereby realleged and incorporated by reference for the purpose of alleging forfeitures, pursuant to the provisions of Title 18, United States Code, Section 2253.

(B) From his engagement in violations alleged in Count One through Three of this Indictment, the defendant, Robert Perry, shall forfeit to the United States, pursuant to Title 18, United States Code, Section 2253, all of his interest in:

(A) Any visual depiction described in Title 18, United States Code, Sections 2251, 2251A, 2252, 2252A, or 2252 of this chapter, or any book, magazine, periodical, which was produced, transported,

mailed, shipped or received in violation of Title 18, United States Code, Sections 2251 through 2258;

(B) Any Property, real or personal, constituting or traceable to gross profits or other proceeds obtained from such offense; and

(C) Any property, real or personal, used or intended to be used to commit or to promote the commission of offense.

Specific property to be forfeited includes, but is not limited to:

(A) One Computer, along with keyboard, speakers, modem, and

(B) All floppy discs.

If any of the property described above as being subject to forfeiture, as a result of any act or omission of the defendant:

(A) cannot be located upon the exercise of due dilligence;

(B) has been transferred or sold to, or deposited with, a third person;

(C) has been placed beyond the jurisdiction of the Court;

(D) has been substanially diminished in value; or

(E) has been commingled with other property which cannot be subdivided without difficulty;

it is the intent of the United States, pursuant to Title 18, United States Code, Section 2253(o), to seek forfeiture of any other property of said defendant up to the value of the above forfeitable property.

A TRUE BILL,

Foreperson

DONNA A. BUCELLA
United States Attorney

By:_____

Colleen D. Murphy
Assistant United States Attorney

By:_____

STEPHEN M. KUNZ
Assistant United States Attorney
Deputy Chief, Criminal Division

APPENDIX E

* * * *

[13] Or were produced using materials

* * * *

Title 18 of the United States Code, Section 2256 (a) defines child pornography as follows: Child pornography means any visual depiction, including any photograph, film, video, [14] picture or computer or computer-generated image or picture, whether made or produced by electronic, mechanical or other means, of sexually-explicit conduct where, A., the production of such visual depiction involves the use of a minor engaging in sexually-explicit conduct; B., such visual depiction is or appears to be of a minor engaging in sexually-explicit conduct.

* * * *

The term "identifiable minor" means a person who was a minor at the time the visual depiction was created, adapted or modified, or whose image as a minor was used in creating, [15] adapting or modifying the visual depiction and who is recognizable as an actual person by the person's face, likeness or other distinguishing characteristic, such as a unique birth mark or other recognizable feature, and shall not be construed to require proof of the actual identity of the identifiable minor.